TS Sambanthamurti v Anthony J Dason & Ors and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-403 OF 1995
NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA
14 JANUARY 1999

Contract *— Rescission — Sale and purchase of land — Allegations of fraud against vendor due to non disclosure of purchaser — Allegations of breach of fiduciary duty of property agent and of vendor's solicitors — Whether fraud duly proved*

The appellant — the owner of a piece of land ('the land') — entered into a sale and purchase agreement to sell the land to the fifth respondent subject to obtaining approval for conversion and subdivision of the land. When the appellant failed to obtain the approval, the first and fourth respondents proposed to sell the land to a third party for the sum of RM3.3m. The appellant and the fifth respondent signed a revocation agreement in which the appellant was required to pay RM100,000. The appellant then brought an action against the respondents claiming that the sale and purchase agreement was revocable at the appellant's option as the agreement to sell the land was obtained by fraud of the first to fourth respondents. The appellant sought for a declaration that the sale and purchase agreement was invalid, the deposit paid by the fifth defendant be forfeited by the appellant, the return of the title, the removal of a caveat that was lodged by the fifth defendant and that the defendants be injuncted from dealing with the land.

The third respondent counterclaimed for the commission owed for finding the fifth respondent as purchaser. The fourth defendant counterclaimed for the breach of the option agreement entered into with the respondent and the fifth respondent counterclaimed for the return of the deposit paid to the appellant and a sum under the revocation agreement. The trial judge dismissed the appellant's claim and allowed the counterclaims of the third to fifth respondents. The appellant appealed contending that fraud was committed against him because it was not disclosed to him that the first respondent was a director of the fifth respondent and that the fourth respondent was an owner the fifth respondent. The appellant also alleged that the first, third and fourth respondents breached their fiduciary duties and that the first respondent as the appellant's solicitor had obtained a secret profit by fraud. With regard to the appointment of the fourth respondent, it was claimed that it was based on an oral agreement and that there was an admission by the appellant in the record of appeal.

With regard to the consolidated appeal, the appellant was ordered to reimburse the respondent for a sum advanced for the payment of the change of condition and subdivision of the land. The appellant appealed contending that there was no evidence of payment made.

A **Held,** dismissing the appellant's appeal in the main appeal and the consolidated appeal, and allowing in part the appellant's appeals against the counterclaim of the fourth respondent:

(1) The appellant's contention that the sale and purchase agreement was tainted by fraud lacked merit because the fraud had not been
B proved. In any event, if the owners of the fifth defendant were of a concern to the appellant, a search of the fifth defendant could be conducted before signing the sale and purchase agreement (see p 108G–H). No evidence was adduced to support the first respondent's allegation of secret profit. The third and fourth
C respondents did not owe any fiduciary duty to the appellant as the third respondent's duty was only to find a purchaser and the fourth respondent was to assist the appellant in obtaining the necessary approval from the relevant authorities (see p 109A–C).

(2) The appeal against the fourth respondent's counterclaim was
D allowed because the appointment of the fourth respondent had not been shown to have been satisfactorily proven as the fourth respondent claimed that it was based on an oral contract (see p 110F).

(3) With regard to the consolidated appeal, the court accepted that
E the sum of money was paid due to the fact that the appellant's land application for change of condition and subdivision were duly approved as a result of the payments made (see p 111H).

[Bahasa Malaysia summary

F

Perayu yang merupakan pemilik sekeping tanah ('tanah tersebut') telah memasuki satu perjanjian jual beli untuk menjual tanah tersebut kepada responden kelima tertakluk kepada perolehan kebenaran untuk penukaran dan pembahagian tanah tersebut. Apabila perayu gagal untuk memperoleh kebenaran tersebut, responden-responden
G pertama dan keempat telah mencadangkan untuk menjual tanah tersebut kepada pihak ketiga sebanyak RM3.3 juta. Perayu dan responden kelima telah menandatangani satu perjanjian pembatalan di mana perayu dikehendaki membayar RM100,000. Perayu seterusnya telah memulakan tindakan terhadap responden-responden
H mendakwa bahawa perjanjian jual beli tersebut boleh dibatalkan atas pilihan perayu kerana perjanjian untuk menjual tanah tersebut telah diperolehi melalui fraud oleh responden-responden pertama hingga keempat. Perayu telah memohon satu deklarasi bahawa perjanjian jual beli tersebut adalah tidak sah, deposit yang telah dibayar oleh defendan kelima dilucut hak oleh perayu, pemulangan hak milik,
I pengalihan kaveat yang telah diadukan oleh defendan kelima dan defendan-defendan diinjunkkan daripada berurusan dengan tanah tersebut.

Responden ketiga telah membuat tuntutan balas bagi komisen yang terhutang kerana mencarikan responden kelima sebagai penjual. Defendan keempat telah membuat tuntutan balas tentang perlanggaran perjanjian pilihan yang dimasuki dengan responden dan responden kelima telah membuat tuntutan balas untuk pemulangan deposit yang telah dibayar kepada perayu dan sejumlah wang di bawah perjanjian pembatalan tersebut. Hakim perbicaraan telah menolak tuntutan perayu dan membenarkan tuntutan-tuntutan balas responden-responden ketiga hingga kelima. Perayu telah membuat rayuan menegaskan bahawa fraud telah dilakukan terhadap beliau kerana ia tidak didedahkan kepada beliau bahawa responden pertama merupakan pengarah kepada responden kelima dan bahawa responden keempat merupakan pemilik responden kelima. Perayu juga mendakwa bahawa responden-responden pertama, ketiga dan keempat telah melanggar kewajipan fidusiari mereka dan bahawa responden pertama sebagai peguamcara perayu telah mendapat keuntungan yang dirahsiakan secara fraud. Berhubung dengan pelantikan responden keempat, adalah didakwa bahawa ia berdasarkan perjanjian secara lisan dan ia merupakan pengakuan oleh perayu di dalam rekod rayuan.

Berhubung dengan rayuan yang telah disatukan, perayu telah diperintahkan untuk membayar balik responden jumlah wang yang telah didahulukan untuk pembayaran penukaran keadaan dan pembahagian tanah tersebut. Perayu telah merayu menegaskan bahawa tiada keterangan bahawa pembayaran telah dibuat.

Diputuskan, menolak rayuan oleh perayu di dalam rayuan utama dan rayuan yang disatukan, dan membenarkan sebahagian daripada rayuan perayu terhadap tuntutan balas responden keempat:

(1) Pendapat perayu bahawa perjanjian jual beli tersebut telah dicemari oleh fraud kurang meritnya kerana fraud tidak dibuktikan. Di dalam apa keadaan pun, sekiranya pemilik defendan kelima perlu diambil kira oleh perayu, satu siasatan ke atas defendan kelima boleh dijalankan sebelum menandatangani perjanjian jual beli tersebut (lihat ms 108G–H). Tiada keterangan telah dikemukan untuk menyokong dakwaan responden pertama tentang keuntungan yang dirahsiakan tersebut. Responden-responden ketiga dan keempat tidak mempunyai apa-apa kewajipan fidusiari kepada perayu kerana kewajipan responden ketiga hanya untuk mencarikan pembeli dan responden keempat membantu perayu untuk mendaptkan kebenaran yang diperlukan daripada pihak-pihak berkuasa yang berkaitan (lihat ms 109A–C).

(2) Rayuan terhadap tuntutan balas responden keempat telah dibenarkan kerana pelantikan responden keempat tidak menunjukkan bahawa ia telah dibuktikan secara mencukupi kerana responden keempat telah mendakwa bahawa ia berdasarkan satu kontrak secara lisan (lihat ms 110F).

A (3) Berhubung dengan rayuan yang disatukan tersebut, mahkamah menerima bahawa jumlah wang yang telah dibayar disebabkan oleh fakta bahawa permohonan penukaran keadaan dan pembahagian tanah perayu tersebut telah pun mendapat kebenaran terlebih dahulu berdasarkan daripada pembayaran yang telah dibuat (lihat ms 111H).]

B

Notes

For cases on rescission, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2879–2882.

C **Appeal from:** Civil Suits Nos F370 of 1984 and F258 of 1985 (High Court, Kuala Lumpur)

Amizaizul Izral (*Bhag Sulaiman & Co*) for the appellant.

Porres P Royan (*T Sudhar* with him) (*Shook Lin & Bok*) for the first and fifth respondents.

D *Ebenezer Ramesh* (*Dason & Co*) for the second respondent.

James Selva (*Ong Kok Bin & Co*) for the third and fourth respondents.

Abu Mansor JCA (delivering judgment of the court): The facts of the case are as follows. The appellant/plaintiff was the registered owner of a piece of land in Kulim, Kedah. The plaintiff was informed by the fourth respondent/ E defendant that his land was valued at RM2.8m and that the fifth respondent/defendant had agreed to purchase plaintiff's land.

The plaintiff entered into a sale and purchase agreement with the fifth defendant. Pursuant to the agreement, the fifth defendant paid and the plaintiff acknowledged receipt of deposit amounting to RM265,000. The F balance of the purchase price was to be paid when the plaintiff had obtained approval for conversion and subdivision of the said land within five months from the date of the agreement.

When the plaintiff failed to obtain the said approval, the first defendant and the fourth defendant proposed to sell the said land to a third party for G the sum of RM3.3m. The plaintiff and the fifth defendant signed a revocation agreement and the plaintiff was required to pay RM100,000 to the fifth defendant.

Plaintiff claimed that the sale and purchase agreement was revocable at his option because his agreement to sell the land, according to him, was H obtained from him by the fraud of first, second, third and fourth defendants.

The plaintiff claimed a declaration in the High Court that the said agreement was invalid and of no effect and that the deposit amounting to RM265,000 paid to the plaintiff be forfeited and that the defendants return the title of the said land and order that the Pentadbir Tanah Kulim cancel I the caveat entered in respect of the said land by the fifth defendant and an injunction preventing the defendants from dealing with the said land and also a claim for damages.

The defendants/respondents on the other hand, counterclaimed. The third defendant counterclaimed an amount of RM56,000 being an agreed commission for finding the fifth defendant as purchaser of the said land while the fourth defendant counterclaimed in damages for the breach of the option agreement dated 1 April 1982 by the plaintiff and expenses arising therefrom and lastly the fifth defendant counterclaimed for the return of RM265,000 and also RM400,000 under the revocation agreement and damages.

The learned trial judge dismissed the claim of the plaintiff awarding costs against him and allowing all the counterclaims of the third defendant, fourth defendant and the fifth defendant. The plaintiff was ordered to pay damages to the third defendant, fourth defendant and fifth defendant.

The plaintiff being dissatisfied with the decision of the learned trial judge appeals to this court (the main appeal).

Before us the appellant put forward several grounds of appeal but he proceeded on only a few.

The first issue was whether the learned trial judge was correct in her judgment that the plaintiff had been unable to prove fraud.

At p 9 of her grounds of judgment, after referring to several authorities on fraud, she said:

> It is also trite law that he who alleges fraud must clearly and distinctly prove it. The burden does not shift to the defendants or any of them to prove that they did engage in fraudulent or other wrongful activity against the plaintiff.

By the authorities cited by the learned trial judge, it was clear to us she was aware and did apply the correct authorities on fraud and the degree of proof required of the appellant.

The appellant contended that fraud was committed against him because, it was not disclosed to him that the first defendant was a director of fifth defendant and fourth defendant and Tan Sri A Tharmalingam who owned the fifth defendant failed to disclose this fact to him. The trial judge said that fraud had not been proved and she held that the sale and purchase agreement remained valid until its revocation.

We find the contention of the appellant that the sale and purchase agreement was tainted by fraud lacked merit. We cannot accept that it was so material and relevant to the appellant who owned the fifth defendant for if it was a matter that he was so concerned it was open to him to conduct a search and it would have been duly revealed who the directors were before he signed the sale and purchase agreement. We agree with the finding and reasoning of the learned trial judge that both the sale and purchase agreement and the revocation agreement were valid.

Apart from the ground of fraud, the appellant also advanced another ground which was that the first, third and fourth defendants are guilty of breach of fiduciary duty. The appellant alleges that the first defendant had breached his statutory duty when, as the appellant's solicitor, he acted fraudulently to obtain a 'secret profit' in the sum of RM500,000.

A It is clear to us that the learned trial judge did not find any evidence to support the appellant's allegation of the obtaining of any secret profit by the first defendant. The appellant, other than mentioning the allegation in his argument, failed to produce any evidence to support this allegation.

Then as regards the alleged breach of fiduciary duty by the third B defendant and fourth defendant, the learned trial judge at p 13 of her judgment said:

> I am also of the view that there is no fiduciary duty on the part of the third and fourth defendants to reveal matters pertaining to the property, sale and purchase agreement and also to act for the benefit and interest of the plaintiff.

C Third defendant's duty was only to find a purchaser and the fourth defendant was to assist the plaintiff in obtaining the necessary approval from the relevant authorities. We agree with the learned trial judge that they owe no fiduciary duty to the appellant.

In the course of argument, Mr Porres Royan for the first and fifth D defendants contended that the appellant had breached the revocation agreement by his refusal of the offer to purchase the said land by Koperasi Majujaya at the price of RM3.3m. The learned trial judge in her grounds of judgment at p 14 dealt with this and she said:

> Thus by rejecting the offer the plaintiff has breached the revocation agreement E and the fifth defendant is therefore entitled to claim from the plaintiff whatever sum is due under the agreement, namely sum of RM665,000 which is as claimed in para 4(1) and (2) of its counterclaim.

As far as the appeal in respect of the appellant's statement of claim against all the respondents is concerned, we dismissed his appeal with costs. As to F the appellant's appeal against the fifth defendant in the counterclaim, we allowed the appeal to the extent of setting aside para (1)(B)(a) of the trial judge's order of 30 May 1995 as at p 42 of the record of appeal bahagian A. We also set aside para (1)(B)(c) in so far as the fifth defendant is concerned. We hereby confirm the learned trial judge's order in para (1)(B)(b) thereof. As for costs in the appellant's appeal against the fifth defendant, the G appellant is awarded 2/3 of costs of the appeal.

We now turn to the appellant's appeal against the third and fourth defendants. Mr James Selva appeared for the third and fourth defendants and responded to this appeal.

He began at the onset by reminding us that the counterclaim of the H third defendant was for a 2% commission for assisting in the sale of the said land for RM2.8m, resulting in the sale and purchase agreement. The commission of 2% was in the sum of RM56,000 with costs and interest.

In the case of the fourth defendant, on the other hand, his counterclaim was for payment of expenses discharged by the fourth defendant in assisting I the plaintiff to obtain the conversion, subdivision and separate titles for the land and also for the refund of RM500,000 paid by the fourth defendant as consideration for the option agreement. Mr James Selva contended that the

appointment by the plaintiff of Tharmalingam and Majid Estate agent was based on an oral contract. Although the appointment was oral there is, however, admission by the plaintiff as it appeared in the record of appeal vol B1 at pp 341–342. At p 42 of the record of appeal, the learned judge's order in para (1)(B)(c) was that the plaintiff do pay to the third, fourth and fifth defendants (fifth defendant having been deleted) damages to be assessed by the senior assistant registrar. Mr James Selva asked us that the appellant's appeal against the third defendant and fourth defendant duly be dismissed.

On being asked by NH Chan JCA who chaired the panel to show the evidence of the expenses incurred by the fourth defendant, Mr James Selva pointed to us the record of appeal vol B1 p 586 where it was stated that the fourth defendant was acting as agent for the third defendant and he was expecting to be reimbursed as the fourth defendant was out of pocket. He urged us to accept that evidence as the statement was unchallenged by the appellant.

It was our opinion that in order that the fourth defendant may successfully claim the expenses there must be documents to prove same and since there are no documents and since the documents were not available at the trial, we ordered that para (1)(B)(c) of the trial judge's order of 30 May 1995 in so far as it concerned the fourth defendant be set aside.

The appellant's appeal against the third defendant is dismissed with costs. The judge's order at p 42 of the appeal record is hereby amended to the effect that para (1)(B)(c) is set aside and substituted therefore with judgment for third defendant for the sum of RM56,000 with the usual interest and costs.

As regards the appellant's appeal against the fourth defendant, this court is not shown satisfactory proof, by appropriate and relevant resolution, that the fourth defendant had been duly appointed. As such the appellant's appeal against the fourth defendant is therefore allowed and the learned trial judge's order in para (1)(B)(c), in so far as it concerned the fourth defendant, is set aside with costs to the appellant to be taxed.

It is clear to this court that as the revocation agreement is no longer valid and enforceable, the fifth defendant is no longer the current purchaser thereof and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant. It was clearly established to us that the said title was with the first defendant for safekeeping. Mr Anthony J Dason who attended in person told us the property was originally charged by the appellant to Nesa Cooperative at the time when the sale and purchase agreement was signed. The title was then made available to him when the chargees asked for its return and he eventually took out an interpleader summons and he was then holding the title as a stakeholder. After the revocation agreement was repudiated, the chargee requested for its return. Mr Dason told the court the title was still with him and he was happy to hand it over to court's custody. This court then ordered that first defendant do deposit the title with senior assistant

registrar of the court pending the outcome of the appeal by the chargee bank.

We then dealt with the consolidated appeal No 258 of 1985. In this case the learned trial judge had made a finding that defendant (Sambanthamurthi) had made request for the advanced money and the learned trial judge ordered that the plaintiff, A Tharmalingam, be reimbursed.

Mr TS Sambanthamurti himself submitted that the learned judge erred in her finding. He submitted further that there is no evidence that Mr Tharmalingam did make payment to the Pemungut Hasil Tanah Kulim, as claimed by him, in the sum of RM50,581. There is also no evidence for the judge's finding in respect of the payment of RM120,000.

Mr Ebenezer Ramesh for the respondent, A Tharmalingam in this appeal submitted that there is evidence that the respondent/defendant did pay that sum of RM120,000 to Dason & Co. Then Dason & Co, at the appellant's request, expanded RM100,000 of that above sum for the payment towards the deposit due to the fifth defendant for the revocation agreement in the main appeal. The amount of RM100,000 was even acknowledged by the appellant in the said revocation agreement. In this connection, RM50,581 was advanced by the third defendant to the fourth defendant for his expenses. It was in evidence that the fourth defendant made a demand for it to the appellant as evidence at p 965 in vol C of the record of appeal. The learned judge in her judgment as at p 20 vol D record of appeal accepted and made that finding. And as regards the payment of RM50,581 at p 790 vol B2 the learned judge accepted the respondent's evidence that he paid RM50,581 into the account of Tharmalingam Majid & Co but he was not issued with any receipt. In vol C at p 1180 of the record of appeal there even appeared a note by appellant and signed by him noting the fact that the payment of RM50,581 was to the land office. Then in DW3's evidence there is evidence supporting the payment of the RM120,000.

When it was put to Mr Sambanthamurthi by the chairman NH Chan JCA that there is evidence of payment the appellant contended that the defendant all ganged up against him and no payment of money was ever made to the Kulim Land Office. Although there is no official receipt for the payment of RM120,000, there is a receipt, however, issued by Dason & Co for RM100,000 and the chairman noted that there is a receipt from the Land Office Kulim for the payment of RM50,581.

This court accepted that the RM100,000 and the sum of RM50,581 were in fact paid. It is also common ground that the appellant's application for change of condition and subdivision were duly approved and the further evidence was that all payments must have been made or else approval would not have been obtained.

In the result the appeal in civil suit 258/1985 is partially allowed by the judgment sum being reduced by RM20,000. We agree with the judgment of the learned trial judge, in the order she made at p 42 of the record of

appeal vol A that the defendant (appellant in the appeal before us) is only to pay the sum of RM100,000 to the plaintiff (Tharmalingam) as well as the sum of RM50,561 with 8% pa interest from the date of judgment to the date of realization with no order as to costs.

Order accordingly.

Reported by Chin En Tek